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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1355

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA AND NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Two briefs in opposition to our Petition for a Writ of Certiorari have been filed, one by the United States in its capacity as a shipper and the other by various organizations of shippers. Since the arguments in the briefs are different, and to some extent inconsistent, we reply separately to each.

A JUDICIAL DECISION ON THE MERITS OF THE COMMISSION'S ORDER IS NECESSARY

The Argument of the United States

The United States argues that "it is well settled that when a carrier invokes the process of a court to enjoin lower rates, and the court's temporary injunction is subsequently dissolved, the carrier has an 'equitable duty' to refund to shippers the excess rates collected as a result of the court's process." (Br. p. 10) This is of course an incorrect statement of the law, as is clear from the language of this Court in *Arkadelphia Milling Co.* v. *St. Louis S.W. Railway Co.*, 249 U.S. 134, 145 (1919), which the United States quotes and on which it relies. This Court there held "that a party against whom an *erroneous* judgment or decree has been carried into effect is entitled, *in the event of a reversal,* to be restored by his adversary to that which he lost thereby." (Br. p. 9; emphasis supplied) As the Court of Appeals said in this very case, the dissolution of a temporary restraining order gives rise to a right to restitution only "in the absence of a later decision in the carriers' favor on the merits" of the order of the Interstate Commerce Commission. (Pet. Ap. 58a) In other words, there is no right to restitution if the temporary restraint of the Commission's order was not improvidently granted and the temporary restraint was not improvidently granted if that order was invalid.

The United States concedes that in *Arkadelphia* there was, whereas here there was not, a judicial determination that the order temporarily restrained was valid. (Br. p. 10) Nevertheless, it says that such a determination is unnecessary. First, it says that an order of an administrative agency "is presumed valid

until there has been a judicial determination to the contrary." (Br. p. 10) Petitioners agree. But as the cases the United States cites make clear, the presumption means no more than that one challenging the validity of an order of an administrative agency has the burden of proof. If, as the Court of Appeals held, the counterclaims for restitution should not have been dismissed, Petitioners have the right to try to carry that burden.

Second, the United States says that the question of the validity of the Commission's order "was rendered moot by the subsequent adoption of higher rates. . . ." (Br. p. 11) The action of the Commission permitting the carriers to subsequently make effective rates higher than those it had ordered canceled of course rendered moot the carriers' suit to enjoin the order of cancellation. But it obviously did not render moot the shippers' counterclaims for restitution of monies collected by virtue of the temporary restraint. Equally obviously, since the right to restitution exists only if the Commission's order was valid, the issue of its validity is not moot. As the District Court properly said, if the counterclaims and the admitted facts in support of them gave rise to a right to restitution, as the Court of Appeals held, the resolution of the issue of the validity of the Commission's order is necessary. (Pet. App., pp. 65a-66a)

Third, the United States says that "it would have been inappropriate for the lower courts to have entertained direct attacks on the cancellation order in resolving the peripheral restitution dispute" because the issues on the validity of that order were complex, the dispute involved only private parties and the United States as a shipper, and the Commission was absent "as an interested party once the dispute over the ac-

tual rates to be charged in the future was terminated." (Br. p. 11) This is a startling and wholly untenable proposition. No court will refuse to resolve an issue, the resolution of which is necessary to the entry of a judgment establishing liability, on the ground that the issue is complex. Much less may a court assume, as did the Court of Appeals here, that were the issue resolved the result would be a judgment establishing liability. As for the absence of the Commission as an interested party in the shippers' suit on their counterclaims for restitution, it was a party to the carriers' suit for an injunction and manifestly both capable and free to rise in defense of its order. Moreover, the statutory defendant charged with the duty to defend the order of its agency is the U.S. Government itself —not the Interstate Commerce Commission.

Finally, the United States says that the interlocutory injunction against the Commission's order of cancellation was denied because the three-judge District Court found that there was not a substantial likelihood that the carriers would prevail on the merits. The simple answer is that this finding falls far short of a finding that the Commission's order was valid, which finding is an initial prerequisite to an award of restitution.[1] Moreover, the United States ignores the fact that this

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[1] We note in passing that a subsequent ICC decision which relied upon the order in issue here was considered in *Ringsby Truck Lines, Inc., et al.* v. *United States,* 263 F. Supp. 552 (1967), appeal dismissed *per curiam, sub nom. National Small Shipments Traffic Conference, et al.* v. *Ringsby Truck Lines, Inc., et al.,* 389 U.S. 576 (1968). There a three-judge District Court for the District of Colorado permanently enjoined an order of the Interstate Commerce Commission directing the cancellation of increases in rates on substantially the same grounds as Petitioners urged in the case at bar.

was only one of five findings of the District Court on which it denied the interlocutory injunction. The Court was faced with the carriers' contention that they needed still higher rates due to the passage of time from 1963 to 1965, during the Commission investigation, and the shippers' contention that irreparable damage would not result if the carriers could justify higher rates to the Commission. The Court, upon weighing the potential damage, concluded that if the carriers' claim were correct, they had an adequate administrative remedy. The fact that the ICC did allow higher rates then led the court to conclude that no damage had accrued to the shippers, thus making unnecessary a determination of the validity or invalidity of the Commission order.

The Argument of the Private Shippers

The shippers argue that "the remedy of restitution cannot be said to be dependent upon an adjudication of the merits of" the Commission's order.[2] (Br. p. 14) They rely on the fact that in both *Arkadelphia, supra,* and *Ex Parte Lincoln Gas & Electric Co.,* 256 U.S. 512 (1921), this Court reversed decrees granting permanent injunctions and ordered the suits dismissed without prejudice. They argue that because the dismissals were without prejudice "there was no final adjudication" of the validity of the orders restrained by the District Court in those cases. (Br. p. 12) As we have seen, the United States makes no such argument, and no such argument can be tenably made. As the Court of Appeals itself pointed out, quoting *Arkadel-*

[2] In their Jurisdictional Statement in *National Small Shipments Traffic Conference, et al.* v. *Middlewest Motor Freight Bureau, et al.,* dismissed, 396 U.S. 111, these parties argued to the contrary.

phia, this Court held that the reversals without prejudice "did not deprive the decrees of conclusiveness as to past transactions, but only prevented them from being a bar to future suits for injunction upon a showing of changed conditions." 249 U.S. at 147 (Pet. App. 23a)

The shippers also rely on *Bell* v. *United States,* 49 F. Supp. 505 (E.D. La. 1943). In that case the District Court had permanently enjoined an order of the Interstate Commerce Commission forbidding railroads to pay allowances to a shipper. Upon reversal by this Court the railroads sought restitution of the monies paid the shipper by virtue of the injunction. One of the defenses of the shipper was that, at its instance, the Commission had re-opened the case, reconsidered its order and held the allowances lawful. The District Court rejected the defense on the ground that "the Commission's report on rehearing clearly shows that the Commission based its conclusion not on the theory that [its] original order . . . was wrong, but on the belief that the case presented by the record made upon rehearing was different from the case originally presented." In other words, the subsequent action of the Commission, taken in the light of what the Court called "changed circumstances and conditions" shown by the shipper in its petition for reopening and reconsideration, did not constitute a reversal of its first order and hence did not render the restraint of that order any the less improvident. 49 F. Supp. at 508.

The shippers further argue that the temporary restraint of the Commission's order of cancellation was improvidently granted because compliance with it would not have caused the carriers irreparable injury. This contention flies in the face of their argument

throughout this case and the holding of the Court of Appeals, namely, that but for the temporary restraint the carriers would have been required to perform transportation at lower rates than they in fact charged and collected. The result would have been an irrevocable loss of revenue because it is fundamental that carriers cannot increase their rates retroactively under any circumstances.

In any event, a temporary restraint was in fact granted. Whether or not the District Court should have granted it, i.e., whether it properly balanced the equities or gave appropriate weight to the factors discussed in *Virginia Petroleum Jobbers Association* v. *Federal Power Commission,* 259 F. 2d 921 (D.C. Cir. 1958), has no bearing on the right of the shippers to restitution. They have no right to restitution unless the temporary restraint of the Commission's order of cancellation permitted the carriers to charge unlawfully high rates. If, as the carriers have consistently contended the Commission's order was invalid, then it is the carriers which have been damaged and the shippers have never been required to pay rates above a reasonable level.

A DETERMINATION BY THE COMMISSION THAT THE INCREASED RATES EXCEEDED MAXIMUM REASONABLE RATES IS NECESSARY

The Argument of the United States

The United States argues that a determination by the Commission that the increased rates exceeded maximum reasonable rates is unnecessary because the Interstate Commerce Act "imposes on the carriers the duty to charge only just and reasonable rates," and the Commission found "that the carriers had failed to

meet their burden of proving . . . that . . . the increased rates were 'just and reasonable' . . ." (Br. p. 12) This argument begs the question. Of course the carriers are charged with the duty to maintain just and reasonable rates. However, only the Commission can determine what rates are just and reasonable. It made no such determination in this case. Hence, assuming *arguendo* that its order of cancellation was valid and therefore improvidently restrained, there must be a reference of the case to the Commission for a determination of the extent to which, if at all, the increased rates collected during the period of the restraint exceeded maximum just and reasonable rates. Absent such a determination the measure of damages, if any, is unknown and no award of restitution can be made.

The United States relies upon *Arkadelphia* supra, *Lincoln Gas* supra, and *Inland Steel Co.* v. *United States,* 306 U.S. 153 (1939). These cases are inapposite. In *Arkadelphia* and *Lincoln* specific rates were legislatively prescribed for future application. Higher rates were charged by virtue of the improvident judicial restraint of the orders of prescription. Hence, the measure of damages in restitution was clearly the difference between the prescribed rates and the higher rates actually charged. In *Inland Steel* an order of the Commission forbidding the railroads to pay allowance to shippers was temporarily restrained at the instance of the shippers on condition that the monies payable to them as allowances be segregated into a separate account and held by the railroads. Upon the affirmance of the Commission's order the amounts so segregated and held, which in the words of this Court, were "exactly known and undisputed," were ordered to be retained by the railroads. 306 U.S. at 161.

The Argument of the Private Shippers

The shippers argue that the petitioners seek to relegate them to individual suits for reparations under Section 204a of the Interstate Commerce Act (49 U.S.C. § 304a), which they claim are precluded "as a matter of empirical fact" because the procedure under Section 204a is complex and can be invoked only by individual shippers with individual claims of "substantial monetary dimensions." (Br. p. 15) Petitioners do not seek to relegate the shippers to individual suits for reparations. Nor are such suits necessary. Assuming *arguendo* that the Commission's order was valid and therefore improvidently restrained, there is no practical or legal impediment to the entry of an order by the District Court in this case referring to the Commission for determination the question of the extent to which, if at all, the rates the carriers charged during the period of the restraint exceeded just and reasonable rates.[3] Thereafter the District Court can enter such judgment on the claims for restitution as is appropriate in the light of the Commission's determination.

The shippers rely on *Accelerated Transport-Pony Express, Inc* v. *United States,* 227 F. Supp. 815 (D.C. Vt. 1964) aff'd *per curiam,* 379 U.S. 4 (1964), for the proposition "that courts have power to make restitution of freight charges collected under applicable tariffs independently of action by the Interstate Commerce Commission." (Br. p. 11) The case does not support

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[3] We note in passing that the Commission permitted rates higher than those it had ordered cancelled to take effect on November 16, 1965, only 49 days after the dissolution of the temporary restraint on September 29, 1965.

the proposition. The District Court there did not, as did the Court of Appeals here, determine the measure of damages in restitution independently of action by the Commission. On the contrary, the measure of damages in restitution was determined by the Commission in the very order the District Court held valid and therefore improvidently restrained. As the Court of Appeals noted, the Commission there found that rates for short hauls higher than rates for long hauls were unlawful—a finding not present in the case at bar—and ordered them cancelled *"to the extent of the discrepancy."* (Pet. App. 28a; emphasis supplied)

CONCLUSION

For all of the reasons set forth in our Petition for a Writ of Certiorari and herein we reiterate the prayer of our Petition, namely, that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, and upon review of the record in that Court, reverse its judgment and remand the case to it with directions that it remand the case to the United States District Court for the District of Minnesota with directions to determine whether or not the order of the Interstate Commerce Commission requiring the cancellation of the increased rates at issue was valid, and, if it finds that it was, to refer the case to the Interstate Commerce Commission for a determination as to what rates were maximum reasonable rates

during the period of the temporary restraint of the Commission's order.

Respectfully submitted,

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